BY THE COURT:

DATE SIGNED: February 9, 2026

Electronically signed by David Conway
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 17 DANE COUNTY

PRECIOUS T. AYODABO, *et al.*,

Plaintiffs,

v.

CITY OF MADISON, *et al.*,

Defendants.

MEMORANDUM AND ORDER

Case No. 2025CV003082

Americans went to the polls on November 5, 2024, to vote in a general election. Like many voters, Plaintiffs submitted timely and valid absentee ballots before election day with the expectation that their votes would be counted. Unlike many voters, Plaintiffs later learned that the local voting authority failed to count their ballots due to a series of errors and inaction by persons responsible for administering the election. Based on these allegations, Plaintiffs have sued the City of Madison, the City of Madison Clerk, and two City employees for depriving them of their constitutional right to vote. They seek only money damages as a remedy.

Defendants have filed motions to dismiss arguing, primarily, that Wisconsin law does not recognize a negligent disenfranchisement claim; that the Wisconsin Elections Commission has exclusive authority to enforce election laws; and that Plaintiffs have not complied with a statutorily-required administrative complaint and appeal process. Defendants Maribeth Witzel-Behl and the City of Madison further argue that Plaintiffs' claims fail because, by using the absentee voting process, Plaintiffs exercised only a statutory privilege, not a constitutional right. The motions are briefed and ready for disposition. The Court denies each motion to dismiss.

BACKGROUND

The Court accepts as true the following alleged facts and reasonable inferences therefrom, which are taken from Plaintiffs' complaint. Dkt. 6.

I. THE PARTIES

Plaintiffs are registered voters who resided in the City of Madison and who cast their votes in the November 2024 election by submitting absentee ballots to the local voting authority—namely, the City of Madison Municipal Clerk's Office.[1] Dkt. 6 ¶¶ 5–6; 43–47.

Defendant City of Madison Municipal Clerk's Office ("MCO") is a municipal agency whose chief officers at the time of the election were the City of Madison Clerk, Defendant Maribeth Witzel-Behl, and her deputy, Defendant Jim Verbick. *Id.* ¶¶ 20–36. The City of Madison Clerk is responsible for overseeing elections in the City of Madison, including ballot processing, vote counting, and result reporting. *Id.* ¶ 27. In their official capacities, Witzel-Behl and Verbick had a duty to ensure that the MCO's policies and practices complied with all legal requirements related to elections. *Id.* ¶¶ 29–36. Defendant City of Madison had control and authority over the MCO and its employees, including Witzel-Behl and Verbick, all of whom the City is required by law to indemnify if liability arises from their official actions. *Id.* ¶¶ 21–24.

II. FACTUAL ALLEGATIONS

In advance of the November 5, 2024 election, Plaintiffs submitted timely and valid absentee ballots to the MCO. Dkt. 6 ¶¶ 5–6; 43–47. Upon receiving Plaintiffs' absentee ballots, Defendants secured them into carrier envelopes with tamper-evident seals and then secured those carrier envelopes into absentee ballot bags also affixed with tamper-evident seals. *Id.* ¶¶ 48, 53.

[1] Plaintiffs Ayodabo, Bloodworth, Brown Jones, Browne, Innab, Pierotti, Sham, and Wolter seek to bring this lawsuit as a class action on behalf of themselves and 185 other similarly-situated absentee voters. Dkt. 6 ¶¶ 113–128. The Court focuses only on Plaintiffs in this decision because a class is not presently certified. *See* Wis. Stat. § 803.08.

In the normal course, Defendants would have unsealed the ballot bags, opened the carrier envelopes, and counted Plaintiffs' absentee ballots on election day. *Id.* ¶ 54. On this particular occasion, however, Defendants somehow overlooked the ballot bags containing Plaintiffs' ballots and the votes did not get counted on November 5. *Id.* ¶ 55.

Despite this oversight, Defendants still had time to correct their error because the Wisconsin Elections Commission ("WEC") did not submit the final formal vote tally, known as the "certified state canvas," until November 29, 2024, and could have legally reopened the canvas as late as December 1. *Id.* ¶¶ 57–62. Defendants even learned prior to the December 1 canvas deadline that numerous absentee ballots were uncounted from Wards 65 and 56. *Id.* ¶ 63.

Ward 65. On November 12, 2024, an MCO employee discovered a sealed absentee ballot bag in a tabulator bin from Ward 65. *Id.* ¶¶ 64, 92. The ballot bag was delivered to the MCO on November 13, where an employee opened it and found 68 uncounted absentee ballots. *Id.* Staff immediately informed Witzel-Behl and Verbick of this discovery. *Id.* Witzel-Behl left for vacation on November 13, without addressing the matter. *Id.* ¶¶ 66–68. Neither she nor Verbick ever instructed staff on how to ensure that these unprocessed Ward 65 votes got counted. *Id.* ¶¶ 66–71. Rather, on November 26, Witzel-Behl instructed staff to open the ballots, "assign voter slip numbers to them, keep them sealed, and record them as having participated"—a process that did not result in the ballots being counted. *Id.* ¶ 93. As a result, the WEC did not include the Ward 65 votes of Plaintiffs Bloodworth, Brown Jones, Pierotti, and Wolter in the certified state canvas it submitted on November 29. *Id.* ¶¶ 72–73.

Ward 56. On November 27, 2024, an MCO employee discovered that a number of absentee ballots from Ward 56 had not been counted. *Id.* ¶ 75. Rather than take immediate action, the employee waited until December 2, after the canvas deadline, to search MCO

facilities for the missing ballots. *Id.* ¶¶ 76–77. In this search, the employee located a bag of unprocessed absentee ballots from Ward 56, including those of Plaintiffs Ayodabo, Browne, Innab, and Sham. *Id.* ¶¶ 78–79. As a result, the WEC did not include the votes of these Plaintiffs in the certified state canvas it submitted on November 29. *Id.*

In the wake of these discoveries, the City of Madison publicly announced the errors and mailed a letter to each of the 193 affected absentee voters, including Plaintiffs. Dkt. 6 ¶¶ 81–85. The City conducted an internal investigation in which it concluded that (1) the MCO's failure to count the absentee ballots on election day was "primarily a process and training failure that could have been avoided," and (2) the MCO's failure to count the absentee ballots after election day despite multiple opportunities was a "dereliction of duties on the part of [Witzel-Behl]." *Id.* ¶¶ 86–98. The WEC also conducted an investigation in which it found numerous errors on the part of Defendants that directly resulted in Plaintiffs' absentee ballots going uncounted. *Id.* ¶¶ 99–109. The WEC concluded that Defendants' actions violated numerous legal obligations under various election statutes—a conclusion that the City of Madison declined to contest. *Id.*

III. PLAINTIFFS' LEGAL CLAIM

Plaintiffs' sole cause of action is a common law claim for the deprivation of their constitutional right to vote. Dkt. 6 ¶¶ 129–138. Each Plaintiff alleges that he or she submitted a valid and timely absentee ballot to Defendants; that Defendants had a legal obligation to count the ballot; and that Defendants failed to do so on election day or afterward despite multiple opportunities. *Id.* Plaintiffs seek money damages as a remedy for their disenfranchisement. *Id.*

STANDARD OF REVIEW

Wis. Stat. § 802.06(2)(a)6 permits dismissal of a cause of action that fails to state a claim upon which relief can be granted. When analyzing the legal sufficiency of a complaint, the Court begins with the basic civil pleading standard: A complaint must set forth "[a] short and plain statement of the claim, identifying the . . . transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." Wis. Stat. § 802.02(1)(a).

To satisfy this general standard, a plaintiff must allege factual allegations which, if true, would "plausibly suggest a violation of applicable law." *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693. "[T]he sufficiency of a complaint depends on the substantive law that underlies the claim made because it is the substantive law that drives what facts must be plead." *Id.* "If proof of well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim." *Cattau v. National Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 6, 386 Wis. 2d 515, 926 N.W.2d 756. In applying this analysis, the Court "accepts as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key*, 2014 WI 86, ¶ 19 (citation omitted). The Court "do[es] not accept as true legal conclusions that are stated in the complaint" and does not "add facts to the complaint." *Cattau*, 2019 WI 46, ¶ 5. "A formulaic recitation of the elements of a cause of action" is not enough. *Id.* (quote omitted).

OPINION

The Wisconsin Constitution guarantees the right to vote to all adult citizens of this State. Wis. Const. Art III, § 1; *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). The Legislature is constitutionally authorized to regulate the election process, including by passing laws defining residency, controlling voter registration, and providing for absentee voting. Wis. Const. Art III, § 2. Pursuant to this authority, the Legislature has enacted numerous statutes governing the election process, including laws specifically allowing registered electors to vote by absentee ballot provided they comply with certain requirements. *See* Wis. Stat. Chapters 5–12 (election laws generally); Wis. Stat. §§ 6.20, 6.84–89 (absentee voting requirements).

In this case, Plaintiffs have sued Defendants to recover monetary damages for depriving them of the constitutional right to vote by failing to count their legally-cast absentee ballots. Defendants argue that the Court must dismiss the complaint for four reasons: (1) Wisconsin does not recognize a damages claim for negligent failure to count ballots; (2) unlike regular voting, absentee voting is a statutory privilege and not a constitutional right; (3) a civil action by the WEC is the "exclusive remedy" for election law violations; and (4) Plaintiffs did not comply with a mandatory WEC administrative complaint and appeal process. The Court will address each theory in turn.

I. WISCONSIN RECOGNIZES A COMMON LAW CLAIM AGAINST ELECTION OFFICIALS WHO NEGLIGENTLY OR MALICIOUSLY DEPRIVE A CITIZEN OF THE CONSTITUTIONAL RIGHT TO VOTE

Defendants argue that "there is no common-law right to damages when ballots are inadvertently uncounted." Dkt. 73 at 2; *see also* Dkt. 72 at 2–3; Dkt. 74 at 2–5. They characterize the case law relied upon by Plaintiffs as outdated and factually distinguishable. *Id.*

Plaintiffs respond that Wisconsin law has long recognized a common law claim for negligent disenfranchisement and continues to do so. Dkt. 59 at 18–19.

Early American case law generally recognized a common law cause of action for voters to recover damages against elections officials who denied them the right to vote. *Voting Wrongs and Remedial Gaps*, 137 Harv. L. Rev. 1182, 1183 (2024). Two of the earliest courts to recognize this cause of action were those of New York and Massachusetts. *Id.* at 1184. Under the New York approach, a voter could only recover damages where an election official maliciously denied him the right to vote. *Jenkins v. Waldron*, 11 Johns. 114, 121 (1814). In contrast, under the Massachusetts approach, a voter could recover damages based on a lesser showing of negligence by the election official. *Lincoln v. Hapgood*, 11 Mass. 350, 353–58 (1814). "This split between Massachusetts and New York over the required showing of intent persisted into the mid-nineteenth century as other states followed them in adopting the action, though more states sided with Massachusetts." 137 Harv. L. Rev. at 1185.

The Wisconsin Supreme Court adopted the Massachusetts approach in *Gillespie v. Palmer*, 20 Wis. 544, 558 (1866). In that case, the plaintiff alleged that the defendant election inspectors "wrongfully and illegally refused to receive the plaintiff's vote, or to deposit the same in the ballot box, for the sole reason that he was a person of African descent, to his damage." *Id.* at 545. The defendants argued that they acted properly and without malice because the electorate had not yet ratified a law allowing African Americans to vote. *Id.* at 545–52. The circuit court sustained a demurrer for failure to state a claim. *Id.* at 545.

On appeal, the Supreme Court concluded that the law granting suffrage to African Americans was properly ratified as of the date of the election. *Id.* at 552–57. The Court also rejected the election inspectors' alternative theory that the plaintiff needed to "aver malice on

their part in rejecting his vote" to recover damages. *Id.* at 557. The Court explained that some courts in England and New York require a showing of malice, but others in Massachusetts and Ohio hold "that the action will lie without malice" based "mainly upon the necessity of protecting the highly valued privilege of voting when the law has provided no other remedy." *Id.* at 558 (citing *Lincoln v. Hapgood*, 11 Mass. 350 (1814)). The Court adopted the Massachusetts approach because it saw "no good reason why the general principle of law, that a ministerial officer is liable for a wrong done by him acting in his official character, though without malice, should not be applied." *Gillespie*, 20 Wis. at 558.

Defendants offer several reasons why this Court should disregard *Gillespie*. They argue that the weight of modern authority is against allowing disenfranchisement claims absent malice. Dkt. 73 at 1–2. They also contend that that *Gillespie's* rationale of providing a remedy where none existed no longer applies due to the enactment of a comprehensive statutory scheme for protecting voter rights. Dkt. 72 at 2. Even so, a circuit court is not free to ignore controlling authority just because it has fallen into disfavor elsewhere or the weight of its reasoning has arguably diminished with time. Defendants point to no Wisconsin decision overturning *Gillespie*. Until one exists, this Court must apply existing precedent and leave it for the Supreme Court to decide whether that precedent should endure.

Defendants also claim that a decision recognizing negligent disenfranchisement would "plunge into dangerous untested waters" and be "the first of its kind in this nation's 250-year history." Dkt. 73 at 2–4. But Wisconsin has already recognized this claim for nearly 160 years. None of the dire consequences predicted by Defendants have come to pass.[2] They finally argue

[2] One possible reason why *Gillespie* has not generated more litigation is the Supreme Court's observation that the negligent deprivation of the right to vote may yield only nominal damages. *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, 42 (1905); *see also Lincoln*, 11 Mass. at 357.

that most disenfranchisement cases, including *Gillespie*, involve an election official refusing to issue an eligible voter a ballot, as opposed to negligently failing to count a person's ballot. Dkt. 74 at 3–4. This is a superficial distinction: issuing a ballot and counting a ballot are both ministerial duties that, when denied, cause a person to lose the constitutional right to vote.

The Court concludes that Wisconsin law recognizes a cause of action for damages against election officials who negligently deprive citizens of the right to vote. The parties do not dispute that Plaintiffs' complaint adequately alleges the required elements of this claim to the extent it is not subject to dismissal on other grounds discussed below.

II. ABSENTEE VOTERS EXERCISE THE SAME CONSTITUTIONAL RIGHT TO VOTE AS POLLING-PLACE VOTERS

Defendant Witzel-Behl and the City of Madison contend that those who vote absentee exercise only a statutory privilege, not a constitutional right. Dkt. 51 at 5–7; Dkt. 53; Dkt. 74 at 7. In their view, the Wisconsin Constitution empowers the Legislature to enact laws "providing for absentee voting," Wis. Const. Art. III, § 2, and the Legislature has made voting by absentee ballot a privilege existing outside the core constitutional protection, Dkt. 51 at 5–7; Dkt. 53. "If a voter chooses to use the method of absentee voting, an error in processing that ballot is a wrong, but not a constitutional wrong," they claim. Dkt. 74 at 7. In response, Plaintiffs assert that Wisconsin courts have continually recognized that absentee voters exercise their constitutional right to vote. Dkt. 59 at 14–16. Any legislative enactments to the contrary, they argue, are facially unconstitutional. *Id.* at 16–18. Non-party *amici curiae*, the WEC and Governor Tony Evers, join Plaintiffs' position, the latter observing that "[t]he constitutional right to vote would mean little if close to half of all voters in Wisconsin were deprived of it because they chose to legally cast an absentee ballot." Dkt. 75 at 10–11; Dkt. 81 at 2–4.

The Wisconsin Constitution's voting guarantee makes no distinction as to the process by which citizens cast their ballots. Wis. Const. Art III, § 1. Our Supreme Court has recognized that those who vote absentee exercise the same constitutional right as those who vote at the polls. In *State ex. rel. Symmonds v. Barnett*, a district attorney candidate challenged the outcome of an election hinging on 61 properly-cast absentee ballots that were disqualified because a ballot clerk forgot to initial them upon receipt. 182 Wis. 114, 195 N.W. 707, 708, 713–14 (1923). Despite a statute prohibiting the counting of uninitialed ballots, the Court ordered the ballots to be counted because "[t]o apply the statute would be to disfranchise a qualified voter through the negligence of election officers." *Id.* at 713–14. As the Court explained:

> The voter who presents himself at the polls has an opportunity to examine his ballot and see that it is properly indorsed by the ballot clerks. The absent voter receives his ballot from the county clerk at which time it is not indorsed. The indorsement of the ballot is a duty which the election officers are required to perform after the ballot has left the hands of the voter and at a time when he is not present to see that the duty is performed. The indorsement of the ballot therefore is not within his power to demand or compel. In order that the constitutional right of the voter shall not be abridged by official dereliction and without any negligence on his part, it is necessary to hold that [the statute] does not apply to absent voters . . .

Id. at 714. The Court has time and again reiterated the *Symmonds* conclusion that absentee voters exercise their constitutional right to vote.[3]

[3] *See, e.g., Trump v. Biden*, 2020 WI 91, ¶ 27, 394 Wis. 2d 629, 951 N.W.2d 568 (holding that striking the absentee ballots of voters who complied with guidance would "disenfranchise" them); *Roth v. Lafarge School, Dist. Bd. of Canvassers*, 2004 WI 6, ¶ 21, 268 Wis. 2d 335, 677 N.W.2d 599 (reiterating *Symmonds* holding that absentee voters may not be deprived of their constitutional right to vote due to the negligence of election officials); *Gradinjan v. Boho*, 29 Wis. 2d 674, 684, 139 N.W.2d 557 (1966) (holding, in the context of absentee voting, that "the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired"); *In re Petition of Anderson*, 12 Wis. 2d 530, 534, 107 N.W.2d 496 (1961) (declining to strike three compliant absentee ballots because the voters "would be deprived of their right to vote"); *In re Burke*, 229 Wis. 545, 282 N.W. 598, 602 (1938) (applying *Symmonds* holding regarding absentee voting).

Despite this authority, Defendants Witzel-Behl and the City of Madison cite a legislative policy statement in the election statutes as evidence that absentee voting is a privilege:

> LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1).[4]

The Constitution's voting guarantee is not in tension with the Legislature's policy statement. The Constitution delegates authority to create an absentee voting process to the Legislature. Wis. Const. Art. III, § 2. The Legislature has exercised this authority by enacting laws creating the absentee process and prescribing how absentee ballots are obtained, returned, and counted. *See* Wis. Stat. §§ 6.20, 6.84–6.89. The Legislature did not have to enact these laws and theoretically could choose to repeal them at any time. In this sense, a voter's ability to utilize the absentee voting process to cast a ballot is a privilege created by and subject to legislative grace. But just because the absentee voting process is a privilege does not mean that those who legally utilize it do not exercise their constitutional right to vote. Of course they do. Once a voter casts a valid absentee ballot that complies with the Legislature's rules for utilizing the absentee process, the voter has exercised the same constitutional right to vote as someone who casts a valid in-person ballot at a polling place. And that right to vote would be a hollow protection if it did not also include the right to have one's vote counted.

[4] The Supreme Court has interpreted this statement as "merely a declaration of legislative policy setting forth that 'absentee balloting must be carefully regulated'" and not "any rule of interpretation applying to the statutes that follow." *Priorities USA v. Wisconsin Elections Comm.*, 2024 WI 32, ¶ 32, 412 Wis. 2d 594, 8 N.W.3d 429.

The Court concludes that a voter who casts a valid absentee ballot exercises the constitutional right to vote and not merely a statutory privilege. When an election official fails to count a valid absentee ballot, whether by negligence, recklessness, or malice, he or she deprives the absentee voter of that constitutional right.

III. WIS. STAT. § 5.05's EXCLUSIVE REMEDY PROVISION DOES NOT REACH PLAINTIFFS' COMMON LAW CLAIMS

Defendants next argue that the Legislature effectively abrogated Plaintiffs' common law claim by making the WEC's civil enforcement authority the exclusive remedy for civil violations of the election statutes.[5] Dkt. 39 at 9–12; Dkt. 47 at 3, 6–7; Dkt. 51 at 4–5. They contend that the Legislature did so under its constitutional authority to provide for absentee voting and to reasonably regulate the right to vote. *Id.* Plaintiffs respond that the exclusive remedy statute on which Defendants rely, by its plain language, does not extend to their cause of action. Dkt. 59 at 33–38. Even if it did, they argue, the statute does not contain sufficiently clear language necessary to abrogate a common law claim. *Id.*

The WEC is authorized by statute to investigate and enforce "any violation of [Wis. Stat. Chpts.] 5 to 10 or 12" by issuing subpoenas; by bringing "civil actions to require a forfeiture"; and by suing for "injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief." Wis. Stat. § 5.05(1). Of particular relevance here, the WEC's enforcement statute contains the following exclusive remedy provision:

[5] Defendants also make a cursory argument suggesting that constitutional changes subsequent to *Gillespie* have overridden Plaintiffs' common law claim. Dkt. 39 at 11. They cite no case law to support this theory or to explain why modern constitutional amendments expanding voting rights would nullify pre-existing common law protections. On reply, they recast this argument as simply an observation that *Gillespie* is a product of its time. Dkt. 73 at 5 n.5. Either way, the Court is not persuaded by this shifting and underdeveloped theory.

> The commission's power to initiate civil actions under this subsection for the enforcement of chs. 5 to 10 or 12 shall be the exclusive remedy for alleged civil violations of chs. 5 to 10 or 12.

Wis. Stat.§ 5.05(2m)(k).

When interpreting a statute, courts must "begin with the statute's plain language because we assume that the legislature's intent is expressed in the words it used." *State ex rel. Markovic v. Litscher*, 2018 WI App. 44, ¶ 12, 383 Wis. 2d 576, 916 N.W.2d 202. In examining the plain language, the Court may consider the context in which the language is used and the scope of the language if ascertainable from the text. *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 45–48, 271 Wis. 2d 633, 681 N.W.2d 110. "If the meaning of the statute is plain, we ordinarily stop the inquiry and give the language its common, ordinary, and accepted meaning." *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 10, 315 Wis. 2d 350, 760 N.W.2d 156. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Kalal*, 2004 WI 58, ¶ 46.

Wis. Stat.§ 5.05(2m)(k)'s exclusive remedy provision is clear and unambiguous.[6] By its plain language, the statute makes the WEC's enforcement authority the "exclusive remedy for alleged civil violations of [Wis. Stat. Chapters] 5 to 10 and 12." In other words, no other government agency or private litigant may civilly enforce these elections statutes. But by limiting the exclusive remedy provision to violations of the specifically-listed election laws, the statute makes clear that the WEC's enforcement authority is not the exclusive remedy for other civil violations, not listed, that may also relate to elections. *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 350 ("[E]xpress mention of one matter excludes other similar

[6] Defendants ask the Court to take judicial notice of a Legislative Council memorandum that they believe supports their proposed interpretation of Wis. Stat. § 5.05(2m)(k). Dkt. 39 at 13–25. The Court declines this request because the statutory language is unambiguous. *Kalal*, 2004 WI 58, ¶ 46.

matters that are not mentioned"). Here, Plaintiffs have not brought this action to obtain relief for civil violations of Wis. Stat. Chapter 5 to 10 or 12. Their complaint makes only passing mention of these election statutes to describe the WEC's investigation. Dkt. 6 ¶¶ 106–07. Instead, Plaintiffs have alleged a common law claim, sounding in tort, to recover damages for the deprivation of a constitutional right. *Id.* ¶¶ 130–38. This distinction places Plaintiffs' claim beyond the reach of the WEC's authority and exclusive remedy provision.

The Court's interpretation of Wis. Stat. § 5.05(2m)(k) is also consistent with the scope and context of the broader statute. The statute elsewhere reiterates that the WEC is responsible "for the administration of chs. 5 to 10 and 12." Wis. Stat. § 5.05(1); Wis. Stat. § 5.05(2w). It is logical that the Legislature would make the scope of the exclusive remedy provision coterminous with the WEC's administrative authority. The statute also gives the WEC standing to "intervene in any civil action or proceeding for the purpose of enforcing the laws regulating the conduct of elections." Wis. Stat. § 5.05(9). The Legislature clearly foresaw election-related lawsuits beyond the scope of the exclusive remedy provision. Furthermore, Defendants' proposed interpretation, if accepted, would fully abrogate Plaintiffs' claims. "[A] statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent." *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833. Wis. Stat.§ 5.05(2m)(k) expresses no such intent. It instead reveals an intent to give the WEC exclusive authority to enforce the election statutes and nothing more.

The Court concludes that Wis. Stat.§ 5.05(2m)(k)'s exclusive remedy provision does not apply to or abrogate Plaintiffs' common law claims.

IV. THE COURT HAS JURISDICTION AND COMPETENCE TO HEAR PLAINTIFFS' CLAIMS EVEN THOUGH THEY DID NOT FILE A WEC ADMINISTRATIVE COMPLAINT OR APPEAL

Defendants finally contend that the Court lacks subject matter jurisdiction over Plaintiffs' claims because Plaintiffs did not comply with the WEC administrative complaint and appeal process. Dkt. 39 at 6–9; Dkt. 47 at 4–6; Dkt. 51 at 4. They argue that this is the "only path to judicial review." Dkt. 39 at 7. In opposition, Plaintiffs aver that the administrative complaint statute does not implicate the Court's subject matter jurisdiction but rather its competency—a narrower concept that does not require dismissal where, as here, the statutory mandate is not "central to the statutory scheme" and the agency lacks authority to award the relief sought. Dkt. 59 at 25–30. They characterize Defendants' contrary case law as a "jurisprudential island" involving distinguishable facts. *Id.* at 30–32. The WEC, as non-party *amicus curiae*, takes the position that the "exhaustion requirement is a required prerequisite for a court's competency where it has not been satisfied, but it is fulfilled in cases where the [WEC] has conducted the statutory investigation and decision process on its own motion." Dkt. 81 at 1, 4–7.

The Court will set forth the relevant WEC administrative complaint provisions before turning to the parties' arguments.

A. WEC Administrative Complaint Process

Wis. Stat. § 5.06 sets forth an administrative process by which the WEC can identify, investigate, and remedy election law violations by local officials. Once this process begins, the WEC may conduct "such investigation as it deems appropriate" and "summarily decide the matter before it and, by order, require an election official to conform his or her conduct to the law, restrain an election official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law." Wis. Stat. § 5.06(6).

The WEC administrative process begins in one of two ways. First, the WEC itself may initiate the process by acting "on its own motion [to] investigate and determine whether any election official, with respect to any matter concerning . . . election administration or conduct of elections, has failed to comply with the law or abused the discretion vested in him or her." Wis. Stat. § 5.06(4). Alternatively, an individual voter may file an administrative complaint with the WEC alleging an election law violation:

> (1) Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning . . . election administrative or conduct of elections is contrary to law, . . . the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law. . . .

Wis. Stat. § 5.06(1). Under the latter approach, no individual voter "may commence an action to test the validity of any decision, action or failure to act on the part of any election official with respect to any matter specified in sub. (1) without first filing a complaint under sub. (1), nor prior to disposition of the complaint by the commission."[7] Wis. Stat. § 5.06(2).

Once the WEC issues an administrative decision, "[a]ny election official or complainant who is aggrieved . . . may appeal the decision of the commission to circuit court for the county where the official conducts business or the complainant resides no later than 30 days after issuance of the order." Wis. Stat. § 5.06(8). On appeal, the circuit court "may not conduct a de novo proceeding" but rather "shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the commission, according due weight to the experience, technical competence and specialized knowledge of the commission." Wis. Stat. § 5.06(9).

[7] Any administrative complaint must be filed "promptly so as not to prejudice the rights of any other party." Wis. Stat. § 5.06(3).

B. Analysis

Defendants argue that the WEC administrative complaint and appeal process is the "mandatory and exclusive" means of challenging misconduct by election officials. Dkt. 39 at 6; Dkt. 47 at 4–6; Dkt. 51 at 4. In support, they rely primarily on *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992), for the proposition that a plaintiff's failure to complete the administrative process pursuant to Wis. Stat. § 5.06 deprives a circuit court of subject matter jurisdiction. Dkt. 39 at 7; Dkt. 47 at 4–6; Dkt. 51 at 4.

On its face, *Kuechmann* appears to confirm that Plaintiffs' failure to comply with the WEC administrative process deprives this Court of subject matter jurisdiction. There, two school board members subject to a recall petition filed an administrative complaint with the State Elections Board (now the WEC) pursuant to Wis. Stat. § 5.06(1). 170 Wis. 2d at 221. In relevant part, the administrative complaint, filed on June 5, 1992, asked the Board to find the recall petition deficient and the recall statute unconstitutional. *Id.* On June 12, the Board issued a preliminary order saying it could not review the constitutional challenge but would proceed to consider the alleged recall petition deficiencies. *Id.* at 221–22. On June 17, the two school board members filed a lawsuit asking the circuit court to the declare the recall statute unconstitutional. *Id.* Two days later, on June 19, the Board issued its final decision finding no recall petition deficiencies and denying the relief sought. *Id.* The circuit court ruled that the recall statute was unconstitutional and enjoined the recall election. *Id.* at 222.

In reversing, the Court of Appeals held that the circuit court lacked subject matter jurisdiction because the plaintiffs did not wait for the Board's final decision before filing suit and did not seek judicial review of that decision as provided in Wis. Stat. § 5.06. *Kuechmann*, 170 Wis. 2d at 224–25. As the court explained, if "'a statute relating to an administrative agency

provides a direct method of judicial review of agency action, such method of review is generally regarded as exclusive, especially where the statutory remedy is plain, speedy, and adequate.'" *Id.* at 224 (quoting *Underwood v. Karns*, 21 Wis. 2d 175, 179–80, 124 N.W.2d 116 (1963)).

Plaintiffs contend that more recent controlling precedent invalidates *Kuechmann's* central holding. Dkt. 59 at 30–32. In *Village of Trempealeau v. Mikrut*, the Supreme Court forcefully rejected the notion that a state statute can eliminate a circuit court's subject matter jurisdiction. 2004 WI 79, ¶ 8, 273 Wis. 2d 76, 681 N.W.2d 190. As the Court explained, the state constitution grants subject matter jurisdiction to circuit courts over "all matters civil and criminal in this state." Wis. Const. art. VII, § 8. A legislative act cannot extinguish a power conferred by the constitution itself. *Mikrut*, 2004 WI, ¶ 8. And so "no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Id.* ("[T]he subject matter jurisdiction of the circuit courts cannot be curtailed by state statute").

However, a circuit court may still lose "competency" to adjudicate a case when a litigant fails to comply with a statutory requirement for invoking the court's jurisdiction. *Id.* ¶ 9. Competency is a "narrower concept" than subject matter jurisdiction; a defect in competency is not jurisdictional and does not render a judgment void. *Id.* ¶¶ 9, 14. "Many errors in statutory procedure have no effect on the circuit court's competency." *Id.* ¶ 10. When deciding competency, the Court must examine the "effect of noncompliance" with a statutory mandate "on the court's power to proceed in the particular case." *Id.* "Only when the failure to abide by a statutory mandate is 'central to the statutory scheme' of which it is a part will the circuit court's competency to proceed be implicated." *Id.* (quote omitted)). On this point, the Court must consider the "legislative purpose of the statutory scheme" and "whether it could be fulfilled, without strictly following the statutory directive." *Id.*

Here, the Court is faced with clear contradictory authority from the Wisconsin Supreme Court discarding the primary jurisprudential underpinning of *Kuechmann* and replacing it with a competency analysis that the Court of Appeals did not consider or apply. Under these circumstances, the Court concludes that *Mikrut* has rendered the central holding of *Kuechmann* obsolete and that it must apply *Mikrut's* competency analysis from scratch.[8] Under that analysis, the Court will examine the circumstances of this case to determine whether Wis. Stat. § 5.06's purpose is still satisfied despite Plaintiffs' failure to file an administrative complaint and appeal.

Wis. Stat. § 5.06 requires voters to "test the validity of any decision, action or failure to act on the part of any election official" by first presenting the issue to the WEC before seeking judicial review of the agency's decision. In turn, the WEC may investigate the matter, render a decision, and issue orders requiring election officials to conform their conduct to the law, to refrain from certain actions, or to correct certain mistakes. Wis. Stat. § 5.06(6). An "aggrieved" election official or complainant can then seek narrow judicial review of the WEC's decision within a limited timeframe. Wis. Stat. § 5.06(8). The self-evident purpose of this remedial procedure is to allow the WEC to apply its specialized expertise to election disputes in the first instance and to quickly issue orders that correct past election errors, stop ongoing violations, and prospectively ensure election integrity, while still providing any party "aggrieved" by the outcome a path to prompt judicial review of the WEC's decision.

In this context, Plaintiffs' non-compliance with the statute's administrative complaint process does not frustrate the statutory purpose. Prior to this lawsuit, the WEC, on its own motion, conducted a full investigation into Plaintiffs' uncounted ballots; issued a final decision

[8] In our system of *stare decisis*, a circuit court must adhere to a subsequent controlling decision of the Wisconsin Supreme Court even if it means deviating from a conflicting earlier decision of the Court of Appeals. *Cf. State v. Jennings*, 2002 WI 44, ¶¶ 18–19, 252 Wis. 2d 228, 647 N.W.2d 142.

finding that Defendants had violated their legal obligations; and ordered them to take certain remedial measures.[9] *See* Dkt. 6 ¶¶ 99–109. In other words, the "validity" of Defendants' actions was "tested," the WEC determined that those actions violated the election laws, and the WEC exercised its remedial authority to ensure election integrity, all before Plaintiffs filed this lawsuit. It would serve no statutory purpose to require Plaintiffs to file a redundant administrative complaint asking the WEC to issue the same decision again and to grant relief it has no authority to award. *See* Dkt. 81 at 7. To hold otherwise would elevate form over substance at the expense of voters and taxpayers, while effectively destroying any possibility of class-wide relief.[10]

Plaintiffs' non-compliance with the judicial review process also does not interfere with the statute's purpose. The law allows a party "aggrieved by an order" of the WEC to obtain review of that decision in a designated forum within a specified timeframe. The Court agrees that this provision intends to (and does) provide the exclusive method for judicial review of a WEC decision. *See Kuechmann*, 170 Wis. 2d at 224 (quoting *Underwood*, 21 Wis. 2d at 179–80). But by its plain language, the statute does not purport to curtail a voter's ability to file other types of lawsuits not seeking judicial review of a WEC order. This case is one such example. Plaintiffs are not "aggrieved" by the WEC's order. They do not seek to collaterally attack or otherwise undermine any aspect of it. Instead, Plaintiffs have brought an independent common law action arising from a constitutional violation beyond the WEC's administrative purview and

[9] The WEC's decision and order is available at https://elections.wi.gov/resources/reports/investigation-city-madison-clerk-regarding-uncounted-absentee-ballots (last visited February 9, 2026).

[10] Administrative exhaustion may also be excused where the agency lacks the authority to afford the plaintiff adequate relief; where "recourse to the administrative agency would be a futile or useless act"; or where "the agency has already informed the party of its position on a question of law where the facts are not disputed." *Nodell Investment Corp. v. City of Glendale*, 78 Wis. 2d 416, 425–26 n.12, 254 N.W.2d 310 (1977); *Mertz v. Veterinary Exam. Bd.*, 2007 WI App 220, ¶ 15, 305 Wis. 2d 788, 741 N.W.2d 244. All three situations appear to exist in this case, further supporting the Court's conclusion that the administrative provisions of Wis. Stat. § 5.06 are not "central to the statutory scheme" in this context.

remedial reach. The Court sees no statutory purpose that would be implicated, much less harmed, by allowing this lawsuit to proceed.

In summary, the Court concludes that the administrative complaint and appeal provisions of Wis. Stat. § 5.06 are not "central to the statutory scheme" where the WEC has already acted on its own motion to issue a final decision and Plaintiffs do not seek to undermine or challenge any part of that decision. The Court therefore has competency to exercise subject matter jurisdiction over Plaintiffs' claims despite the fact that they did not first file an administrative complaint with the WEC and do not seek judicial review of a WEC order.

V. DEFENDANT CITY OF MADISON CLERK IS DISMISSED WITHOUT OBJECTION

Defendants ask the Court to dismiss Defendant City of Madison Clerk because it is not an entity capable of being sued separately from the City of Madison. Dkt. 39 at 12. Plaintiffs do not object. Dkt. 59 at 38 n.18. The Court agrees and dismisses the City of Madison Clerk as a party.

ORDER

IT IS ORDERED that Defendants City of Madison and City of Madison Clerk's motion to dismiss (Dkt. 38) is DENIED.

IT IS FURTHER ORDERED that Defendant Jim Verbick's motion to dismiss (Dkt. 46) is DENIED.

IT IS FURTHER ORDERED that Defendant Maribeth Witzel-Behl's motion to dismiss (Dkt. 50) is DENIED.

IT IS FURTHER ORDERED that the City of Madison Clerk is dismissed as a party to this action without objection by any party.

This is not a final order for purposes of appeal